



This document is scheduled to be published in the Federal Register on 05/07/2013 and available online at <http://federalregister.gov/a/2013-10211>, and on [FDsys.gov](http://FDsys.gov)

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 1, 28, and 52**

**FAR Case 2011-023; Docket 2011-0023; Sequence 1**

**RIN: 9000-AM53**

**Federal Acquisition Regulation; Irrevocable Letters of Credit**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule

**SUMMARY:** DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to remove all references to Office of Federal Procurement Policy (OFPP) Pamphlet No. 7, Use of Irrevocable Letters of Credit, and also provide updated sources of data required to verify the credit worthiness of a financial entity issuing or confirming an irrevocable letter of credit (ILC).

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat at one of the addressees shown below on or before **[Insert 60 days after publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments in response to FAR Case 2011-023 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2011-023." Select the link "Submit a Comment" that corresponds with "FAR Case 2011-023." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2011-023" on your attached document.
- Fax: 202-501-4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7<sup>th</sup> Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAR Case 2011-023, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cecelia Davis, Procurement Analyst, at 202-219-0202, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAR Case 2011-023.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to remove all references to OFPP Pamphlet No. 7, Use of Irrevocable Letters of Credit, and provide updated sources of data required to verify the credit worthiness of a financial entity issuing or confirming an ILC.

OFPP Pamphlet No. 7 provided detailed guidance for implementing policy letter 91-4, Use of Irrevocable Letters of Credit (ILC), for Government contracts. A prior FAR final rule (FAR Case 2000-605, Rescission of Office of Federal Procurement Policy Letters, 65 FR 36014) removed the FAR references to OFPP Policy Letter 91-4 along with several other policy letters that were rescinded by OFPP, effective March 30, 2000 (see 65 FR 16968). However, the reference to OFPP Pamphlet No. 7 remained in FAR Part 28 because the information was considered relevant and provided, among other information, a listing of available quantitative and qualitative credit rating institutions and resources, formats for ILCs, and other useful data.

FAR 28.204-3 currently cites OFPP Pamphlet No. 7 at subparagraphs (g)(1) and (h)(1) as an available resource that may be used to obtain information on credit rating services or investment grade ratings of financial entities issuing or confirming ILCs because it provides overarching policy and specific guidance on the use of ILCs, but some

of the information is outdated. Therefore, instead of referencing the OFPP Pamphlet, this rule proposes to—

(1) Extract from the OFPP Pamphlet the relevant and current information for inclusion in the FAR; and

(2) Provide additional sources of data required to verify the credit worthiness of a financial entity issuing or confirming an ILC, as summarized on the websites of the Federal Deposit Insurance Corporation

(<http://www2.fdic.gov/idasp/index.asp>) and Securities and Exchange Commission (<http://www.sec.gov/answers/nsro.htm>).

## **II. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## **III. Regulatory Flexibility Act**

DoD, GSA, and NASA do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule only removes references to OFPP Pamphlet No. 7 in FAR Part 28 and replaces these references with information relative to sources of data required to verify the credit worthiness of a financial entity offering an ILC. Nevertheless, an Initial Regulatory Flexibility Analysis has been performed, and is summarized as follows:

This action is necessary to remove a reference to OFPP Pamphlet No. 7, Use of Irrevocable Letters of Credit, and provide updated sources of data required to verify credit worthiness of a financial entity issuing or confirming an ILC.

The objective of the rule is to provide up-to-date and readily available information on requirements regarding credit rating for the financial institution issuing or confirming an ILC.

This will apply to all contracts for services, supplies, or construction, when a bid guarantee or performance and payment bonds are required. 40 U.S.C. 3131 requires performance and payment bonds for any construction contract exceeding \$100,000; this was raised for inflation to \$150,000 (see FAR 1.109). Any person required to furnish a bond has the option to furnish a bond secured by an ILC. For construction contracts valued at \$30,000 to \$150,000, alternative payment protection is required, which may involve an ILC. Generally, agencies do not require bonds for other than construction contracts. According to data from the Federal Procurement Data System, in FY 2011 there were about 58,000 new awards for construction and construction maintenance, of which 41,000 were awarded to small businesses (about 70 percent). If we estimate that 10 percent of these awards involve an ILC, then this rule applies to approximately 4,100 small businesses.

The rule only removes references to OFPP Pamphlet No. 7 and replaces these references with information relative to sources of data required to verify an ILC that generally replicates what was in

the pamphlet. There are no new reporting, recordkeeping, or compliance requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

No significant alternatives to the rule were identified that would accomplish the objectives of the rule. We do not foresee any significant economic impact of the rule on small entities. The basic requirements remain unchanged; the requirements of the pamphlet are directly stated, some of the references have been updated, and a website provided for access to a list of Nationally Recognized Statistical Rating Organizations.

DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this proposed rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR case 2011-023) in correspondence.

#### **IV. Paperwork Reduction Act**

The proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). However, there is a pre-existing requirement at FAR 52.228-14 for offerors/contractors to provide the contracting officer a credit rating that indicates the financial institutions have the required credit rating as of the date of issuance of the ILC. OMB Control Number 9000-0045, titled: Bid Guarantees,

Performance and Payment Bonds, and Alternative Payment Protections, covers the information collection requirements associated with alternative payment protections (including ILCs) and acceptable security for bonds (including ILCs). ILCs are seldom offered as alternative payment protection or security for a bid bond, performance bond, or payment bond. The negligible burden of providing a credit rating along with the required ILC is already sufficiently covered by the approved burden hours in 9000-0045.

**List of Subjects in 48 CFR Parts 1, 28, and 52**

Government procurement.

Dated: April 25, 2013.

Laura Auletta,  
Director,  
Office of Governmentwide  
Acquisition Policy,  
Office of Acquisition Policy,  
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 1, 28, and 52 as set forth below:

1. The authority citation for 48 CFR parts 1 and 52 continues to read as follows:

**AUTHORITY:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

**PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM**

1.106 [Amended]

2. Amend section 1.106, in the table following the introductory text, by adding in numerical sequence, FAR segment "52.228-14" and its corresponding OMB Control No. "9000-0045".

**PART 28—BONDS AND INSURANCE**

3. The authority citation for 48 CFR part 28 is revised to read as follows:

**AUTHORITY:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

4. Amend section 28.204-3 by revising the section heading and paragraphs (a), (g), and (h) to read as follows:

**28.204-3 Irrevocable Letter of Credit.**

(a) Any person required to furnish a bond has the option to furnish a bond secured by an irrevocable letter of credit (ILC) in an amount equal to the penal sum required to be secured (see 28.204). A separate ILC is required for each bond.



\* \* \* \* \*

(g) Only federally insured financial institutions rated investment grade shall issue or confirm the ILC. Unless the financial institution issuing the ILC had letter of credit business of at least \$25 million in the past year, ILCs over \$5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least \$25 million in the past year.

(1) The offeror/contractor is required by paragraph (d) of the clause at 52.228-14, Irrevocable Letter of Credit, to provide the contracting officer a credit rating from a recognized commercial rating service that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC.

(2) To support the credit rating of the financial institution(s) issuing or confirming the ILC, the contracting officer shall verify the following information:

(i) Federal insurance. Each financial institution is federally insured. Verification of federal insurance is available through the Federal Deposit Insurance Corporation (FDIC) institution directory at the website <http://www2.fdic.gov/idasp/index.asp>.

(ii) Current credit rating. The current credit rating for each financial institution is investment grade and that the credit rating is a Nationally Recognized

Statistical Rating Organization (NRSRO). NRSROs can be located at the website <http://www.sec.gov/answers/nrsro.htm> maintained by the SEC.

(3) The rating services listed in the website above use different rating scales (e.g., AAA, AA, A, BBB, BB, B, CCC, CC, C, and D; or Aaa, Aa, A, Baa, Ba, B, Caa, Ca, and C) to provide evaluations of institutional credit risk; however, all such systems specify the range of investment grade ratings (e.g., BBB-AAA or Baa-Aaa in the above examples) and permit evaluation of the relative risk associated with a specific institution. If the contracting officer learns that a financial institution's rating has dropped below investment grade level, the contracting officer shall give the contractor 30 days to substitute an acceptable ILC or shall draw on the ILC using the sight draft in paragraph (g) of the clause at 52.228-14.

(h) A copy of the Uniform Customs and Practice (UCP) for Documentary Credits, 2006 Edition, International Chamber of Commerce Publication No. 600, is available from: ICC Books USA, 1212 Avenue of the Americas, 21st Floor, New York, NY 10036, Phone: 212-703-5066, Fax: 212-391-6568, E-Mail: [iccbooks@uscib.org](mailto:iccbooks@uscib.org), Via the Internet at: <http://store.iccbooksusa.net>.

## **PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

5. Amend section 52.228-14 by revising the date of the clause and paragraphs (d), (e)(5), and (f)(5) to be read as follows:

**52.228-14 Irrevocable Letter of Credit.**

\* \* \* \* \*

IRREVOCABLE LETTER OF CREDIT **(DATE)**

\* \* \* \* \*

(d)(1) Only federally insured financial institutions rated investment grade by a commercial rating service shall issue or confirm the ILC.

(2) Unless the financial institution issuing the ILC had letter of credit business of at least \$25 million in the past year, ILCs over \$5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least \$25 million in the past year.

(3) The offeror/Contractor shall provide the Contracting Officer a credit rating that indicates the financial institutions have the required credit rating as of the date of issuance of the ILC.

(4) The current rating for a financial institution is available through any of the following rating services registered with the U.S. Securities and Exchange Commission (SEC) as a Nationally Recognized Statistical Rating Organization (NRSRO). NRSRO's can be located at the website <http://www.sec.gov/answers/nsro.htm> maintained by the SEC.

(e) \* \* \*

5. This Letter of Credit is subject to the Uniform Customs and Practice (UCP) for Documentary Credits, International Chamber of Commerce Publication No.

(Insert version in effect at the time of ILC issuance, e.g., "Publication 600, 2006 edition") and to the extent not inconsistent therewith, to the laws of \_\_\_\_\_  
State of confirming financial institution, if any, otherwise  
State of issuing financial institution.

\* \* \* \* \*

(f) \* \* \*

5. This confirmation is subject to the Uniform Customs and Practice (UCP) for Documentary Credits, International Chamber of Commerce Publication No.

(Insert version in effect at the time of ILC issuance, e.g., "Publication 600, 2006 edition") and to the extent not inconsistent therewith, to the laws of \_\_\_\_\_  
State of confirming financial institution.

\* \* \* \* \*

[BILLING CODE 6820-EP]

[FR Doc. 2013-10211 Filed 05/06/2013 at 8:45 am; Publication

Date: 05/07/2013]